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THE CONSTITUTIONALITY OF THE UNFAIR PRACTICES ACTS

*By Jeannette E. Thatcher**

I

Some serious constitutional problems have arisen in those states¹ adopting legislation directed against the unfair competitive practices of locality price discrimination and selling below cost, or use of "loss leaders." Prompted by small businessmen's animosity toward these ruinous depression-stirred tactics and fostered by the general dread of monopolistic tendencies and their economic effects, statutes variously designated, *inter alia*, as Unfair Practices Acts, Fair Sales Acts, and Anti-price Discrimination Acts, have appeared in twenty-eight states in the last decade. The California Unfair Practices Act of 1935, as amended in 1937, was one of the earlier enactments and has served as a model for many of the later acts.

The vigor of the motivating forces in operation here is shown not only by the rapid spread of this type of legislation, but also by the extemporaneous draftsmanship apparent in the statutes themselves. Not a few states,² in their legislative haste, perpetuated a typographical error appearing in the California act in the section

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¹*Sales below cost only*: Arizona, Connecticut, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Tennessee, Virginia, West Virginia (11).

Price discrimination only: Delaware, Florida, Mississippi, Missouri, South Dakota, Vermont (6).

Both: Arkansas, California, Colorado, Idaho, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Carolina, Utah, Washington, Wisconsin, Wyoming (19).

2 C. C. H. Trade Regulation Service (9th Ed. 1944) 7503, § 8000 *et seq.*

²E.g., Wyoming. See *State v. Langley*, *infra* footnote 65.

relating to the interpretation of the act inadvertently calling for "literal" instead of "liberal" construction.

Unfortunately, in the precipitancy more grave and fundamental inaccuracies and inadequacies commonly persisted in the Unfair Practices Acts. As a result, several of the acts have been declared unconstitutional, principally as violations of due process.³ Others have been partially invalidated, and the constitutionality of nearly all is open to grave doubt.

It is the purpose of this article to review generally the bases upon which unconstitutionality of the unfair trade practices acts has been most successfully predicated, with special emphasis on the sales below cost provisions, and to examine critically the present statutes of Minnesota and of Oregon⁴ in the light of the principles deduced. The most prolific source of perplexity in evaluating the constitutionality of these acts has been the due process clause of the Fourteenth Amendment of the United States Constitution, and discussion here will be limited to the following phases of that specific constitutional problem:

(1) Is the prohibition of sales below cost within the legislative prerogatives of the states under the police power?

(2) Are the statutory requirements relating to the nature of the dealer's intent in making the prohibited sales consistent with due process?

³The history of the Minnesota legislation on the subjects of locality price discrimination and sales below cost has been turbulent. A statute prohibiting locality discrimination in the dairy business, Minn. Laws 1921, ch. 305, G. S. Minn. 1923, sec. 3907, was held unconstitutional in *Fairmont Creamery Co. v. Minnesota*, (1927) 274 U. S. 1, 47 S. Ct. 506, 71 L. Ed. 893. A contemporaneous statute, Minn. Laws 1921, ch. 413, G. S. Minn. 1923, secs. 10464 to 10467, prohibiting locality discrimination generally was repealed by Minn. Laws 1937, ch. 116. The 1937 act was held unconstitutional in part in *Great Atlantic & Pacific Tea Co. v. Ervin*, (D.C. Minn. 1938) 23 F. Supp. 70. Next the legislature in order to correct the constitutional defects pointed out in the *Ervin* case amended the 1937 act by Minn. Laws 1939, ch. 403, codified as Mason's 1927 Minn. Stat., 1940 Supp., secs. 3976-37 to 3976-49. The 1939 act was interpreted in *McElhone v. Geror*, (1940) 207 Minn. 580, 292 N. W. 414, and in *McFadden Lambert Co. v. Winston & Newell Co.*, (1941) 209 Minn. 245, 296 N. W. 18. Still another act was passed, Minn. Laws 1941, ch. 326, codified as 1 Minn. Stat. 1941, secs. 325.01 to 325.07, secs. 325.48, 325.49, and 325.52, to clarify uncertainties brought to light by those cases.

⁴The Oregon act has not yet become a subject of judicial concern, although the Attorney-General has several times given an opinion touching upon some of its provisions. In Reports of Oregon Attorney-General, 1938-1940, p. 509, and in Reports of Oregon Attorney-General, 1940-1942, p. 61, he ruled that the anti-discrimination act does not apply to photographers and to barbers, respectively. In Reports of Oregon Attorney-General, 1936-1938, p. 187, he ruled that the exemption of lumber and lumber products from the act, and the use of the expression "food commerce" did not render the act unconstitutional, and that the 6% provision discussed *infra*, text following footnote 76, was not arbitrary or unreasonable.

(3) Does the statutory description of the acts constituting offenses possess that certainty and definiteness necessary in a penal statute?⁵

THE POLICE POWER

Early in the judicial interpretation of sales below cost prohibitions it was felt that such provisions were of a "price-fixing" nature and accordingly beyond the police power of a state, unless the businesses regulated were properly to be regarded as "affected with a public interest." In *Balzer v. Caler*,⁶ the California District Court of Appeal gave its opinion that the California Act as applied to a grocery business was unconstitutional because such a business is not one so affected.⁷

Later, when in *Nebbia v. New York*⁸ the U. S. Supreme Court liberalized the concept of businesses affected with a public interest, this argument was rendered substantially ineffective because, the legislature having power to regulate businesses whenever the means adopted were reasonably directed toward an evil reasonably conceived to exist, it was clear that there existed in the unfair practice field at least a sufficiently debatable area of economic evil to give the legislature power to experiment with regulation.

In 1938 the California Supreme Court in *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., Inc.*,⁹ found the California statute invulnerable to this attack by an equivocation between two theories. The court explained the principles of *Nebbia v. New York*¹⁰ and found the Unfair Practices Act to be a sufficient compliance therewith, even as a price-fixing act. Thereupon the court expressed the view that nevertheless the act was not of a "price-fixing" nature, on the ingenious though somewhat tenuous theory that the prohibition against sales below cost merely fixes a floor beneath which prices may not go, the seller's discretion in fixing his price remaining otherwise untrammelled.

Since the time of the *Wholesale Tobacco Dealers Decision* the

⁵It is not suggested that the above list is exhaustive of tenable constitutional objections in any particular case. Other issues which may possibly arise include impairment of the obligation of contracts, burdening of interstate commerce, and violation of equal protection or of state uniformity clauses.

⁶(Cal. App. 1937) 74 P. (2d) 839, aff'd on other grounds, (1938) 11 Cal. (2d) 663, 82 P. (2d) 19. This case was a companion case of *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.*, infra footnote 9.

⁷Accord: *State ex rel. English v. Rubak*, (1938) 135 Neb. 335, 281 N. W. 607.

⁸(1934) 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940.

⁹(1938) 11 Cal. (2d) 634, 82 P. (2d) 3, 118 A. L. R. 486.

¹⁰*Supra*, footnote 8.

courts have uniformly held these statutes to be within the power of the legislature, either upon the ground that they are not "price-fixing" acts,¹¹ or upon the ground that they satisfy the tests laid down in *Nebbia v. New York*,¹² or upon some combination of both such grounds.¹³ Accordingly, at the present time it seems safe to assume that the type of legislation under discussion is no longer vulnerable to the criticism that it is beyond the domain of the police power, and that these statutes are valid unless they are arbitrary or unreasonable for some other reason.

II

STATUTORY REQUIREMENTS OF INTENT

Some states have enacted statutes containing flat prohibitions of sales below cost, with no indication that a particular kind of intent on the part of the seller is necessary to constitute the offense. In *Commonwealth v. Zasloff*,¹⁴ the court considered the constitutionality of the 1937 Pennsylvania Fair Sales Act, Section 2 of which provided: "It is hereby declared that the advertisement, offer for sale, or sale of any merchandise at less than cost by retailers or wholesalers is prohibited."¹⁵ There was no reference either in the title of the act or in any other section to the effect of the proscribed conduct upon competition. The court concluded that such a "sweeping prohibition," alleviated only by exceptions of certain types of sales of only a "minor nature," was unconstitutional, since selling merchandise below cost is in general "an innocent and legitimate practice, and subject to abuse only in occasional circumstances."¹⁶ The court expressed its opinion that, if the act had "confined itself to prohibiting sales below cost when intended to destroy competition, it would undoubtedly be valid . . ."¹⁷

State ex rel. Lief v. Packard-Bamberger & Co.,¹⁸ which was relied upon in the *Zasloff* case, had construed a statute¹⁹ containing

¹¹*Carroll v. Schwartz*, (1940) 127 Conn. 126, 14 Atl. (2d) 754; *Rust v. Griggs*, (1938) 172 Tenn. 565, 113 S. W. (2d) 733; *State v. Langley*, (1938) 53 Wyo. 332, 84 P. (2d) 767, 775.

¹²*State v. Walgreen Drug Co.*, (1941) 57 Ariz. 308, 113 P. (2d) 651; *Moore v. Northern Kentucky Independent Food Dealers Ass'n*, (1941) 286 Ky. 24, 149 S. W. (2d) 755; *McElhone v. Geror*, (1940) 207 Minn. 580, 292 N. W. 414.

¹³*Associated Merchants of Montana v. Ormesher*, (1939) 107 Mont. 530, 86 P. (2d) 1031; *State v. Sears*, (1940) 4 Wash. (2d) 200, 103 P. (2d) 337.

¹⁴(1940) 338 Pa. 457, 13 Atl. (2d) 67, 128 A. L. R. 1120.

¹⁵Pa., 73 Purdons Stat. Ann., sec. 202.

¹⁶(1940) 13 Atl. (2d) 67, 70.

¹⁷*Ibid.*

¹⁸(1939) 123 N. J. L. 180, 8 Atl. (2d) 291.

¹⁹N. J. Stat. Ann., secs. 56:4 to 56:7.

a provision identical with Section 2 of the Pennsylvania Act. The New Jersey court had discussed the absence of any requirement of intent in conjunction with other offense elements found to be vague and uncertain, concluding that the proscribed conduct was not so clearly described that a person could know what course was lawful, and that action against an alleged offender thereunder would be arbitrary and unreasonable.

Both the Pennsylvania and the New Jersey cases rely upon *Fairmont Creamery Co. v. Minnesota*,²⁰ wherein an early Minnesota statute²¹ was tested which prohibited locality discrimination with respect to prices paid by buyers of milk and other dairy products for manufacture or resale. There the U. S. Supreme Court had invalidated the statute, holding, *inter alia*, that, since the inhibition of the statute applied irrespective of motive, the statute was invalid as an obvious attempt to destroy defendant's liberty to enter freely into normal contracts.²²

On the other hand, the United States Supreme Court long ago upheld an anti-price discrimination act containing as an element of the offense a clear and specific requirement of intent. In *Central Lumber Co. v. South Dakota*²³ the South Dakota Act was sustained as against the arguments, first, that it denied equal protection by its indefensible classifications, and second, that it unreasonably limited liberty of contract. The statute prohibited locality price discrimination by anyone committing the acts described ". . . intentionally, for the purpose of destroying the competition of any regular established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer . . ." ²⁴ The due process clause was apparently not argued, but in discussing the second argument the court said that ". . . the law does not otherwise encounter the Fourteenth Amendment . . ." ²⁵

²⁰(1927) 274 U. S. 1, 47 S. Ct. 506, 71 L. Ed. 893, 52 A. L. R. 163.

²¹Minn. Laws 1909, ch. 468, amended Minn. Laws 1921, ch. 305, and Minn. Laws 1923, ch. 120.

²²The court relied in part upon *Williams v. Standard Oil Co. of Louisiana*, (1929) 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, and *Tyson & Bro. United Theatre Ticket Offices v. Banton*, (1927) 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, and other early price-fixing cases following the early narrow concept of "affected with a public interest," since liberalized by *Nebbia v. New York*, (1934) 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940. The extent to which this fact should be regarded as weakening the *Fairmont* decision on the point here involved (and hence the Pennsylvania, New Jersey and other cases relying thereon) is problematical.

²³(1912) 226 U. S. 157, 33 S. Ct. 66, 57 L. Ed. 164.

²⁴S. D., Laws 1907, ch. 131.

²⁵(1912) 226 U. S. 157, 162, 33 S. Ct. 66, 57 L. Ed. 164.

There is a group of statutes containing a provision which apparently requires an element of intent to constitute the offense of unfair trade practices, but which is couched in much broader language than that of the South Dakota statute. The 1939 Maryland Act, considered in *Daniel Loughran Company, Inc. v. Lord Baltimore Candy & Tobacco Company, Inc.*,²⁶ prohibited advertisements, offers or sales below cost

"with the intent, effect, or result of unfairly diverting trade from or otherwise injuring a competitor, or with the result of deceiving any purchaser or prospective purchaser, substantially lessening competition, unreasonably restraining trade, or tending to create a monopoly in any line of commerce."

The Maryland court declared the act unconstitutional because this provision, together with others found to be fatally indefinite in themselves, rendered the language so general that "it may embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal . . ."²⁷ The court observed:

"When the far-reaching effect of such legislation is visualized, one is startled at its possibilities. Geographical equations have no standing in the Act, and no trader embraced in its provisions can conduct his business at any time with any degree of certainty that he is not violating the law . . ."²⁸

Again, in *Great Atlantic & Pacific Tea Co. v. Ervin*²⁹ the court disapproved the second paragraph of Sec. 2, Part 2, ch. 116, Minn. Laws 1937, prohibiting locality discrimination "where the effect of such lower prices may be substantially to lessen competition or tend to create a monopoly in any line of business, or to injure, destroy or prevent competition with the person selling at such lower prices . . ." Pointing out that the prohibition applied irrespective of the actual intent of the merchant, the court held that the legislature had no power to declare honest price differentials, based upon real differences in sales costs, to be illegal, since the effect of the provision was to discriminate arbitrarily and unfairly between merchants owning a store in only one locality and those owning a store in each of several localities.³⁰

²⁶(1940) 178 Md. 38, 12 Atl. (2d) 201.

²⁷(1940) 178 Md. 38, 51, quoting 16 C. J. 67, 12 Atl. (2d) 201, 205.

²⁸*Id.* at 51.

²⁹(D. C. Minn. 1938) 23 F. Supp. 70, 76-78.

³⁰The federal court also struck down a paragraph making sales at less than 10% above manufacturer's list price, less published discounts, *prima facie* evidence of violation of the act since the provision made no distinction between the probative value of such evidence on the two distinct elements of the offense. The court conceded the reasonableness of an inference of sale below

Similarly, the Nebraska court in *State ex rel. English v. Ruback*³¹ invalidated the sales below cost portion of the 1937 Nebraska Unfair Practices Act which illegalized those sales "where the effect of such sale below cost . . . may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors . . ." The court stressed the presence of the word "may" as comprehending all possible rather than all reasonably probable consequences. Hence the clause so widened the field of illegal acts that the act violated due process by reason of its indefiniteness. Another section of the same act, in which locality price discrimination was prohibited, was contrasted in dictum as containing a more adequate requirement of intent.³²

It is to be noted that none of these cases seem to regard intent *per se* as a constitutionally essential element of the offense of unfair trade practice. Yet wherever intent was not made indispensable by the statute itself, in the sense that an injurious effect upon competition might be substituted therefor, the court found the statute fatally indefinite.

In *McElhone v. Geror*,³³ the Minnesota court expressly stated that the absence of a requirement of intent as essential to violation was not fatal to the 1939 Act, but that sales below cost which have the effect of injuring competition may be prohibited regardless of intent. The court then considered other aspects of the statute, with a view to determining whether it was sufficiently definite and certain. Nevertheless, since demurrer had admitted allegations sufficient to show violation by defendant of the sales below cost provision, the court did not have the help of evidence, as did the Nebraska and federal courts in the cases just discussed. Accordingly, its conclusion that the statute is sufficiently definite

cost, but pointed out that the fact would have no bearing upon the presence or absence of the intent found to be a part of violation of the particular section of the statute involved.

³¹(1938) 135 Neb. 335, 281 N. W. 607. The Federal Trade Commission has expressed an opposite view with respect to the words "may be" in Sec. 2 of the Clayton Act, since amended by Sec. 2 (a) of the Robinson-Patman Act, stating that "it is *tendency* and *probable effect* rather than the *actual results* that are important," and that the words indicate "neither bare possibility, nor certainty, but probability, to be deduced from the intent or inherent character of the acts themselves." In the Matter of the Goodyear Tire & Rubber Company, (Mar. 5, 1936) 22 F. T. C. 232, 331.

³²Cf. *State v. 20th Century Market*, (1940) 236 Wis. 215, 294 N. W. 873, where the act allegedly violated read "intent or effect" but the defendant was charged with intent to do the prohibited acts. Since neither intent nor effect was found proved, defendant was discharged without consideration of constitutional issues.

³³(1940) 207 Minn. 580, 292 N. W. 414.

and certain necessarily relates to the limited circumstances presented in the complaint. Indeed, the court virtually reserved an opinion on at least two phases of uncertainty argued, stating, e.g.: ". . . On this point the statute is definite and certain, *enough so, anyway, to fend off the present attack so far as it proceeds upon the supposition that it is otherwise.*"³⁴

An interesting treatment of a statute similarly containing the language "intent or effect" is found in *State v. Walgreen Drug Co.*³⁵ The defendant there urged that the statute was invalid since it imposed civil and penal liability on those violating its provisions without criminal intent. But the court upheld the statute, holding that "the only reasonable implication from the entire language of the chapter" was that criminal intent was an essential ingredient of violation. Two cases were cited as examples of similar statutory construction, neither of which seems adequate authority for disregarding the plain words "or effect."³⁶ It may be inferred that the court feared that a construction giving the clause "intent or effect" full meaning would result in unconstitutionality.³⁷

Two other cases concerning themselves with the intent requirement in the Unfair Practice Acts are worthy of mention.³⁸ In both cases the statute was judicially aided as against the argument that the absence of the requirement was fatal. In *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.*,³⁹ the section

³⁴(1940) 207 Minn. 580, 589, 292 N. W. 414, 419 (Italics supplied.).

³⁵(1941) 57 Ariz. 308, 113 P. (2d) 651.

³⁶In *People v. Kahn*, (1936) 19 Cal. App. (2d) 758, 60 P. (2d) 596, the statutory language was entirely dissimilar, and all that was necessary for a clear requirement was judicial insertion of a comma separating the intent clause from the last item in a parallel series of prohibited acts. In *Omaechevarria v. Idaho*, (1918) 246 U. S. 343, 38 S. Ct. 323, 62 L. Ed. 763, the grazing statute in question was supplemented by a general statute requiring either intent or criminal negligence as an element of every crime.

³⁷Cf. (1942) 36 Ill. L. Rev. 682, 686, note, criticizing the Arizona court for condemning "a state of mind, not a business evil."

³⁸Related to the problem of the necessity of an intent requirement is an interesting problem which has been excluded from the scope of this article: where the statute requires an intent to injure competitors, to what extent may proof of the necessary intent be aided by statutory presumptions? One of the two judges dissenting seriatim in *People v. Pay Less Drug Store* (1944) 25 Cal. (2d) 108, 128, 153 P. (2d) 9, 20, pointed out that a specific intent as distinguished from a general criminal intent must be shown, and argued that accordingly a section of the statute by which the intent was presumed upon proof of commission of the act together with proof of injurious effect was invalid. Cf. the discussion in (1938) 32 Ill. L. Rev. 816, 824-827.

³⁹*Supra*, footnote 8.

attacked actually contained a requirement of purposeful violation, although the qualifying clause was not clearly separated from the last of the series of prohibited acts immediately preceding the purpose clause. The court judicially inserted a comma, holding, pursuant to well recognized rules of statutory construction, that the phrase modified each of the members of the series—an unexceptionable result.⁴⁰

The second case, *Rust v. Griggs*,⁴¹ held intent was a necessary ingredient despite the fact that Sec. 3 of the Tennessee act, in defining the offense, made no mention of such a requirement. That section did, however, condemn sales "in contravention of the policy of this Act" and Sec. 2 of the Act in describing that policy made it sufficiently clear that it was only acts done with the "intent or effect" of injuring competitors which were penalized. The construction of the interpolated language "or effect" was neither called for nor volunteered by the court, because demurrer had admitted an allegation averring sales by defendant with intent to impair competition.

Summarizing the aggregate effect of the decisions relating to statutory requirements of intent discussed in Part II of this article, it is submitted that the likelihood that a given act will be held constitutional has a direct relation to the extent of restriction in this portion of the penalizing statute. It may be admitted that due process probably does not impose upon state legislatures the necessity of including conscious intent to do wrong as an element of statutory offenses.⁴² However, due process does require that all crimes be designated in language sufficiently definite and certain to inform a person of ordinary understanding what course of conduct he may lawfully pursue.⁴³ Whenever the legislature departs from the standard of subjective guilt—in these cases some form of conscious intent to accomplish harm to competitors—then in the circumstances peculiarly surrounding these cases, it is submitted that such a multitude of possibilities reasonably gains admittance to the realm of prohibited statutory acts that the unconstitutionality of the act is virtually assured. The next section hereof is devoted to discussion of the types of uncertainties which may arise.

⁴⁰Accord: *People v. Kahn*, *supra*, footnote 36; *Great Atlantic & Pacific Tea Co. v. Ervin*, *supra*, footnote 29.

⁴¹(1938) 172 Tenn. 565, 113 S. W. (2d) 733.

⁴²*Rottschaefer*, *Constitutional Law* (1939 Ed.) sec. 315, pp. 763-765.

⁴³*Id.* at sec. 316, pp. 765-767.

III

INDEFINITENESS AND UNCERTAINTY OF COST PROVISIONS

A. Cases Denying Constitutionality

In *Great Atlantic & Pacific Tea Co. v Erwin*,⁴⁴ the Minnesota statute under attack, Minn. Laws 1937, ch. 116, contained two paragraphs specifically directed to defining the term "cost" and the phrase "cost of doing business" respectively.

Part II, Sec. 3, Par. 3, Subsec. 1 provided: "The term 'cost' as applied to the wholesale or retail vendor shall mean: (1) Where a manufacturer publishes a list price, cost shall be the manufacturer's list price less his published discounts plus the cost of doing business by said vendor . . ."

Part II, Sec. 3, Par. 4 provided: "The 'cost of doing business' or 'overhead expense' is defined as the average of all costs of doing business incurred in the conduct of such business during the calendar year immediately preceding any alleged violation of this Act . . . and must include without limitation the following items of expense . . ."

Both paragraphs were held by the federal court to be unconstitutional, the third because it arbitrarily required the merchant to adopt as his cost for the purposes of the act a sum which might or might not be his actual cost. The evidence showed that the manufacturer's list prices reduced by published discounts did not always correspond with the prices paid by retailers but that the market price in the retail grocery business fluctuated more rapidly than the list price. The fourth paragraph was held objectionable on the ground that it took no account of the current selling costs of a merchant who had accomplished a reduction in his overhead at any time during the year, either by revolutionizing his accounting or sales basis, or by improving his efficiency. Since the statute foreclosed all attempts to show that current selling costs at the time of asserted illegal sales had varied from the yearly average, the provision was regarded as unreasonable and unconstitutional. The court indicated that the statute might have been sustained had the preceding year's average been made only *prima facie* evidence of the merchant's current costs.⁴⁵

⁴⁴*Supra*, footnote 29.

⁴⁵Accord: *McElhone v. Geror*, (1940) 207 Minn. 580, 587, 292 N. W. 414, 418. Here the Minnesota court sustained the two provisions after modification so that the manufacturer's list price, less published discount, and the preceding year's average of overhead expense were merely *prima facie* evidence of the merchant's cost.

In *Commonwealth v. Zasloff*⁴⁶ section 1 (a) of the Pennsylvania statute defined "cost to the retailer" as the actual consideration paid for the merchandise, or alternatively, as the consideration necessary for replacement, the latter to be determined "... by applying to said merchandise the same cost per unit as the last quantity purchased by the retailer prior to the said sale of said merchandise would have cost per unit if bought at the most favorable market price available to the retailer at any time within thirty (30) days prior to the said sale, whichever is lower, less any customary trade discounts, but exclusive of discounts for cash."⁴⁷

The court expressed the view that this language set a standard for differentiation of criminal and legitimate sales so vague, indefinite and incapable of practical application that this in itself would make enforcement of the statute a violation of due process. The court took the position that the alternative method was unreasonable in requiring the merchant to ascertain cost by an exhaustion of every possible source of inquiry to find the most favorable market price which would have been available to him over so long a period as thirty days.⁴⁸ Similarly, the statute involved in *State ex rel. Lief v. Packard-Bamberger*⁴⁹ contained a definition of "cost to the retailer" substantially identical with the alternative method of determination set forth in the Pennsylvania act. The New Jersey court, in holding the act fatally indefinite, commented briefly upon the lack of clarity in the standard for determining cost.

In *State v. Walgreen Drug Co., supra*, the court passed upon the constitutionality of Arizona Laws 1929, c. 39, which contained an interpretation clause qualifying the general definition of "cost" to retailer or wholesaler, partially withdrawing the standard by providing that "purchases made . . . at a price which cannot be justified by prevailing market conditions within this state shall not be used in determining cost. . . ." The court held that part of the definition to be so indefinite and uncertain as to be arbitrary and unreasonable. The same or a similar clause was also contained in the New Jersey, Maryland and Pennsylvania statutes, which were

⁴⁶*Supra*, footnote 14.

⁴⁷Pa., 73 Purdon's Stat. Ann., sec. 201.

⁴⁸These observations constituted dicta, however, for the court expressly designated them as "unnecessary" and rested the decision upon the ground hereinabove discussed, text, at footnotes 14-17.

⁴⁹*Supra*, footnote 18.

all found⁵⁰ to be invalid.⁵¹ Of the four courts, the Maryland court, speaking in *Daniel Loughran Co., Inc. v. Lord Baltimore Candy & Tobacco Co., Inc.*, most clearly expressed the potential injustices latent in the objectionable phrase:

"Upon the dealer who would avoid transgressing the law there is thus placed the burden of first ascertaining what are the 'existing market conditions,' then determining whether those conditions justify a certain price, and finally, upon the assumption that his analysis is correct and his judgment sound, utilizing that figure as a basis for his cost computation. . . .

"It matters not that he acted in good faith. . . .

"The dealer takes a chance, and if he has accurately judged market conditions, and the relativity of prices to those conditions, he is clear of the law; but if not, he is open to its consequences, criminal and civil."⁵²

While the four courts were unanimous in condemning the clause, two of them were not in agreement as to the effect upon the statute of its deficiency.⁵³ The Maryland court declared that the provision, relating as it did to the method of computing cost, was a vital part of the foundation of the legislative structure, concluding (despite the severability clause) that the other sections fell with the invalid interpretation clause. On the other hand, the Arizona court in the *Walgreen Drug Co. Case* merely invalidated the definitive clause, taking the view that, because the different provisions were by the act expressly declared to be severable, the entire act was not necessarily vitiated, but that the chapter was "workable" with the objectionable portion of the definition eliminated.

Another clause frequently found in the unfair practices acts provides in substance that the statute shall not apply to sales made to meet the "legal prices of a competitor selling the same articles

⁵⁰State ex rel. Lief v. Packard-Bamberger Co., supra footnote 18; Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., supra footnote 26; Commonwealth v. Zasloff, supra footnote 46.

⁵¹In *Rust v. Griggs*, (1938) 172 Tenn. 565, 113 S. W. (2d) 733, an identical provision was attacked, not on the basis of indefiniteness, which was not mentioned, but on the ground that it burdened interstate commerce by denying the right to use as a basis for his selling cost the invoice cost on goods purchased by the merchant in another state on a market lower than that in Tennessee. The court construed "market conditions" as a broad enough term to include purchase prices of goods on sale in neighboring states, concluding that the legislature intended merely to exclude exceptional sale prices irrespective of the locale of the sale.

⁵²(1940) 178 Md. 38, 47-48, 12 Atl. (2d) 201, 205-206.

⁵³In the New Jersey and Pennsylvania cases the question did not arise since the statutes were invalid in their entireties for other reasons discussed hereinabove, text at footnotes 14-19.

in the same locality or trade area." Some of the statutes do⁵⁴ and some do not include in the clause the words "in good faith." This clause came into question in the New Jersey and Pennsylvania cases just mentioned, and both courts felt that a merchant could not know whether he would incur the penalties of the statute by lowering his price to that of a competitor unless he could examine the books of the competitor to determine whether the competitive price was "legal." Under the New Jersey view, good faith in meeting the price, believing it to be a "legal" price would be no defense if in fact it was not "legal."

The words "same locality or trade area" in this clause may likewise prove fatally indefinite under the theory of *State v. Standard Oil Co. of New Jersey*.⁵⁵ In that case the words "locality," "community," "section," and "section of a locality," etc., were condemned as used in a provision prohibiting locality price discrimination. The unfair practice acts do not attempt to indicate what geographical areas would be included within such terms. Two places of business side by side probably would be regarded by all as situated in the same "locality" or "trade area" but if the establishments were separated by the distance of one city block or even by the width of a busy street, the matter would become doubtful.⁵⁶

B. Cases Affirming Constitutionality

The early case of *Rust v. Griggs*⁵⁷ held Tennessee's unfair practice act sufficiently definite to be constitutional in spite of its definition of "cost to the retailer" as the lower of the following:

"(1) the purchase price of the product or commodity to the retailer at the retail outlet when invoice is dated not more than 60 days prior to the sale of such product or commodity by the retailer, or (2) the replacement cost of such product or commodity . . . at the time of sale . . . plus a mark up amounting to (not) less than the minimum cost of distribution by the most efficient retailer, which mark up, in the absence of proof to the contrary, shall be six per cent (6%)."⁵⁸

It was argued with respect to (1) that the Fourteenth Amendment was violated because a retailer who bought on a low market and kept his merchandise for more than 60 days would be required to

⁵⁴California, Minnesota, Oregon, inter alia.

⁵⁵(1940) 195 S. C. 267, 10 S. E. (2d) 778.

⁵⁶This issue was raised in *McElhone v. Geror*, see text at footnotes 33-34, but the court, though doubting the effectiveness of the argument, equivocated and came to no clear decision.

⁵⁷(1938) 172 Tenn. 565, 113 S. W. (2d) 733, supra footnote 51

⁵⁸Tenn., Williams Tenn. Code Anno., Sec. 6770.7 (a).

advance his prices above a reasonable profit in order to avoid violation. The court rejected the contention, holding that the exception of bona fide clearance sales, and other isolated transactions, would permit sale of the old stock at any price selected by the merchant. Subdivision (2) was held to be sufficiently definite though it required ascertainment of the cost of distribution of "the most efficient retailer." The court said the words were used in a generic sense and not to designate any particular individual, observing that: "To ascertain such cost of distribution is no great task. Matters of that sort are readily available in numerous trade surveys contained in trade journals and other publications."⁵⁹

Two years later in *State v. Sears*⁶⁰ the constitutionality of the Washington act came into question, one of the provisions challenged being similar to the clauses held invalid in the *Zasloff and Packard-Banberger Cases*, *supra*. The provisions permitted "the meeting in good faith of a legal competitive price." The court distinguished both of those cases on the ground that the New Jersey and Pennsylvania statutes, unlike the Washington act, contained no requirement of intent as an element of the offense. Accordingly, the court concluded that, since any sales in violation of the Washington act must be made with intent to destroy competition, "if a merchant in good faith reduces his prices to meet those of a competitor, who he in good faith believes has a legal price, he will not be violating either the intent or the wording of the act."⁶¹ The California court in *People v. Pay Less Drug Store* took the same position, adopting the reasoning and some of the language of the *Sears Case*, although decision of the point was not strictly necessary under the fairly strong facts of the California case.

Nevertheless, it would seem that the Washington view in effect deletes from the statute the word "legal." If the legislative intent was truly interpreted by the court, inclusion of the word "legal" was nothing more than the use of a meaningless adjective and indicative of careless statutory draftsmanship. Yet if the term was used advisedly by the legislature, and the court's purpose in deleting it was to save the statute from fatal indefiniteness, the propriety of the course is doubtful and greater candor on the part of the court would certainly be desirable.

⁵⁹(1938) 172 Tenn. 565, 574, 113 S. W. (2d) 733, 736.

⁶⁰(1940) 4 Wash. (2d) 200, 103 P. (2d) 337.

⁶¹(1940) 4 Wash. (2d) 200, 217, 103 P. (2d) 337, 345. There was a vigorous dissent in which the position was taken that the act was clearly invalid for uncertainty.

Although *Rust v. Griggs* and *State v. Sears* are inconsistent with the cases invalidating similar unfair practices acts, neither is a strong authority. In the *Sears Case*, the question having arisen on demurrer to the complaint, the defendant stood on his demurrer when it was overruled. The Washington court stated:

"If we had before us a proper factual background, we might more easily determine whether or not the terms 'cost' and 'cost of doing business,' as defined in chapter 221, are too uncertain and indefinite to reasonably be applied by any merchant, but we have in this case only the language of the statute and we are not prepared to say at this time, judged by the language of the statute alone, that simple and proper accounting practices will not disclose the necessary information. . . ."⁶²

Similarly, in *Rust v. Griggs* the case came before the court on the allegations of a bill admitted by demurrer, and without factual color and background. The averments showed a strong case for injunction in that the defendant was alleged to be employing deceptive advertising, misleading the public and unfairly diverting trade from competitors by use of the slogan: "Pay Cash; Pay Less"—whereas, except for the loss leaders complained of, many of the items advertised were sold at prices substantially above the prevailing price. In addition, the *Rust Case* was one of the first cases ruling on the constitutionality of the unfair practices acts and did not have the benefit of the ideas and arguments adduced in later cases.⁶³

The California case, *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.*, *supra*, which is usually cited as upholding the constitutionality of the local act, is not to be regarded as precluding the possibility that that act is fatally indefinite, for the court found it unnecessary to decide the question. It is possible to infer that the court doubted the seriousness of the argument, but the court excused itself on the basis of the finding of the lower court, pursuant to stipulation of the parties, that the defendant had sold the goods involved at less than invoice or replacement cost, plus cost of doing business. It was further stipulated that the cost of doing business in defendant's line of activity was an established fact. The court observed:

"Under such circumstances the issue cannot and should not be

⁶²(1940) 4 Wash. (2d) 200, 214, 103 P. (2d) 337, 344.

⁶³The only case called to the attention of the court was *People v. Kahn*, (Cal. App. 1936) 60 P. (2d) 596, 599, in which the California court conceded that "in many cases it is going to be extremely difficult to determine what the cost of an article is. We are of the opinion, however, that the difficulty will be a factual one, that of discovering the cost, as a truth, and not a legal one, that of discovering what the Legislature meant by the term."

determined in this proceeding. When and if the issue is properly presented against a proper factual background with appropriate evidentiary material, this court can then and only then determine the reasonableness of this provision."⁶⁴

However, there is a line of authority represented by at least two well-considered cases under the view of which the unfair practices acts are fully within the limits of the due process requirements as to definiteness and certainty. The earliest of these cases, *State v. Langley*,⁶⁵ considered the validity of the 1937 Wyoming act, which was for all practical purposes indistinguishable from the Arizona, New Jersey, Maryland and Pennsylvania acts invalidated for indefiniteness. Two justices, or a majority of the court, were of the opinion that it was unnecessary to discuss those parts of the statute undertaking to define the cost of doing business, as the defendant by a plea of guilty had admitted making the sale below cost for the purposes denounced by the statute. The lower court had certified the constitutional issues to the Wyoming Supreme Court following defendant's motion in arrest of judgment. The author of the opinion, however, felt that the question should be decided and devoted several pages of discussion to the matter, concluding that the statute could be sustained. Accordingly, his remarks have the weight only of a concurring opinion and not the force of decision.

The Wyoming justice quoted a long list of questions propounded by the California appellate court in *Balzer v. Caler* as illustrative of important unanswered problems of cost determination and indicative of fatal indefiniteness. Then he wittily reversed the process and propounded his own series of illustrations on the thesis that "if the legislature should attempt to do what that court [in *Balzer v. Caler*] intimates it should do, a greater interference with freedom of action would result than by the legislative act in question."⁶⁶ The author of the opinion argued that all that a merchant is required to do to comply with the provisions of the statute is to act in good faith, determining his approximate cost according to a reasonable method. The legislature, it was declared, must be presumed in the absence of provisions to the contrary not to have intended to prescribe that the cost must be absolutely exact. So long as the particular method adopted by a merchant could not be shown to be unreasonable, and did not disclose an intentional evasion of the law, the merchant's computation would be regarded as correct under the Wyoming justice's theory.

⁶⁴(1938) 11 Cal. (2d) 634, 662, 82 P. (2d) 3, 19.

⁶⁵(1938) 53 Wyo. 332, 84 P. (2d) 767.

⁶⁶(1938) 53 Wyo. 332, 363, 84 P. (2d) 767, 779

The same view was taken a year later by the Montana court in *Associated Merchants of Montana v. Ormesher*.⁶⁷ The court devoted most of its opinion to the questions whether the statute was a price-fixing law, and whether it was within the police power as an enactment reasonably designed to accomplish a valid purpose. After upholding the act on these points, the court briefly touched upon a final contention that the cost provisions were indefinite, brushing the defendant's arguments aside with a quotation from the Wyoming justice's remarks in *State v. Langley*. This case had been tried to the court without a jury and the record on appeal comprehended only the judgment roll, unaided by a factual background. *State v. Sears, supra*, likewise quoted from the *Langley Case* and was probably to some extent influenced by the Wyoming justice's theory.

The Wyoming and Montana cases, in accepting the acts as sufficiently definite, inadequately handle a most troublesome problem of cost determination—that of the apportionment of overhead expense or “cost of doing business” among the hundreds or thousands of items constituting the stock in trade of the retail merchant. The types of questions which arise when an attempt to apportion is made are illustrated by a quotation in the margin.⁶⁸

The dissenting judge in *State v. Sears* effectively answered the Wyoming view when, speaking of the “infinite number of problems” arising in apportionment of costs, he said:

“It does not appear to me that these problems can be resolved by saying that the act establishes a standard of reasonableness or that the legislature recognized that there would be a wide variation in the accounting formulas used by those subject to the act, and in-

⁶⁷(1939) 107 Mont. 530, 86 P. (2d) 1031, noted in (1939) 23 Minnesota Law Review 861.

⁶⁸“The significance of the lack of a standard for apportionment may, however, be readily appreciated by reference to but a few of the uncertainties which arise therefrom. For example: Is rent to be apportioned upon a basis of floor space occupied? Is this factor affected by the length of time an article has been in the store before it is sold? When rent varies, as it does from time to time, are goods carried over from the prior rent level subject to apportionment on the basis of the new or the old rent charge? Does depreciation refer to buildings and fixtures, or to stock, or both? Are articles of stock peculiarly subject to depreciation to bear the whole load of this item or cost, or is it to be spread over other articles not ordinarily subject to spoilage and deterioration? Are delivery costs to be allocated only among those articles actually delivered? Are advertising costs to be borne entirely by particular articles advertised? . . . The conclusion that the average retailer would be unable to resolve these questions with any reasonable degree of certainty, and that there would inevitably be wide variations in the results of individual computations, seems inescapable.” Mr. Justice Simpson, dissenting in *State v. Sears*, 4 Wash. (2d) 200, 238, 103 P. (2d) 337, 354.

tended to require nothing more than that each should make a reasonable computation in good faith and not sell below that figure. Instead it seems plain that the legislature simply failed to accord any consideration to the problem of apportionment, that no standard was in fact established, and that because there is no generally accepted formula commonly used by business men for this purpose the statute should be found to be invalid. To invest the act with a standard of conduct would, under these circumstances, be to indulge in judicial legislation."⁸⁹

Unless a standard for allocating a fixed portion of overhead to individual items is established by the statute, or exists *dehors* the statute in ascertainable form, it would seem virtually impossible to determine whether a given merchant is violating the sales below cost prohibition. A slight difference in their systems of overhead cost allocation might result in justification of substantial differences in the prices of identical commodities as between competing merchants. Shifts in the basis of cost allocation, although innocently adopted for the purpose of achieving a more equitable accounting basis, would bear the same indica as deliberate use of loss leaders and would doubtless have the same effect upon competition. Should such acts be punishable as criminal?

The cases do not and could not pretend that cost accounting systems are uniform in different businesses, or even uniform throughout single businesses. The acts surely do not indicate that they intend a freezing of accounting methods to those in use at the date of the enactments. Since no universally accepted accounting system covering these important details has been devised, why should any merchant be precluded from abandoning a system he finds deficient for any other which he may choose or invent? If only reasonable methods are intended to be used, why is there no standard by which the reasonableness of a particular method can be determined?

Yet should the legislature, in an effort to avoid the Scylla of an indefinite standard for differentiation of legal and illegal acts, assume to dictate in detail the methods by which merchants must establish their prices, the resulting legislation may well encounter Charybdis in the form of *Nebbia v. New York's* limitation upon the extent of the police power. It is a fair question whether the evil toward which the unfair practices acts have been directed is such as to justify extensive restrictions on the merchandising entrepreneur's freedom of action. Nevertheless, in their present statutory forms, the enforcement of these acts, in the absence of a standard (either within

⁸⁹(1940) 4 Wash. (2d) 200, 239, 103 P. (2d) 337, 354.

or without the acts) for resolution of the myriad problems of apportionment of overhead expense which confront every merchant, is so highly conjectural that, it is submitted, the prohibitions of these acts, are too vague, arbitrary and uncertain to be supportable under due process.

IV

CONSTITUTIONALITY OF THE MINNESOTA AND OREGON ACTS

A. The Issue of Intent

Minnesota

The present form of the Minnesota prohibition against sales below cost, codified as 1 Minn. Stat. 1941, sec. 325.04, par. 1, forbids such sales "for the purpose or with the effect of injuring competitors and destroying competition," and provides that a violator is "upon conviction, subject to the penalty therefor provided in section 325.48, subdivision 1." However, sec. 325.48, subdiv. 1 expressly limits the applicability of its penalties to violations of sec. 325.15 to 325.24 and sec. 325.25 to 325.33 which are provisions forbidding the financing of sales of motor vehicles by manufacturers, and regulating the manufacture, renovation and sale of bedding respectively. Perhaps the reference in sec. 325.04, par. 1 was intended to be to sec. 325.48, subdiv. 2 (1), quoted in the margin.⁷⁰

Assuming that the penalty imposed for violation of sec. 325.04 is established by sec. 325.48, subdiv. 2 (1), it would seem that the words "wilfully violating" must be given effect in conjunction with the intent requirements of sec. 325.04 itself. "Wilfully" is equivalent to "knowingly" and implies that the act was done by design and with stubborn purpose but without malice.⁷¹ Since one who wilfully or knowingly made a sale below cost "with the effect of injuring competitors" must have intended such an injury, apparently sec. 325.48, subdiv. 2 (1) accomplishes the virtual elimination of the words "or with the effect." Accordingly, despite the unnecessarily cumbersome approach to this construction, it would seem that the Minnesota sales below cost provision falls within the group of acts making strictest requirement of intent and hence is

⁷⁰1 Minn. Stat. 1941, sec. 325.48, subdiv. 2 (1): "Any person, firm, or corporation, whether as principal, agent, officer, or director, for himself, or itself, or for another person, firm, or corporation, *wilfully* violating the provisions of sections 325.03, 325.04, 325.05, and 325.52 shall be guilty of a misdemeanor." (Italics supplied)

⁷¹State v. Stein, (1892) 48 Minn. 466, 51 N. W. 474; Wong v. City of Astoria, (1886) 13 Ore. 538, 11 Pac. 295; Fry v. Hubner, (1899) 35 Ore. 184, 57 Pac. 420.

less likely to be declared unconstitutional. There is, of course, at least a fair chance that the court will refuse to follow the circuitous path outlined and will give full meaning to the words "with the effect," in which case the constitutionality of the act becomes dubious.

Comparing the provisions of sec. 325.03, prohibiting locality price discrimination, a clear and seemingly innocuous intent requirement will be observed: "intentionally, for the purpose of destroying the competition of any regularly established dealer or to prevent the competition" of others intending and attempting to become dealers. However, the provisions of sec. 325.52, relating to proof of violations, quoted in the margin,⁷² virtually incorporate the qualifying words "or without the effect" into the previously clear sec. 325.03. Nevertheless, by again applying sec. 325.48, subdiv. 2 (1) with its reference to "wilful" violations of sec. 325.03, the dangerous implication can be overcome. Thus construed the provision remains relatively innocuous, but the mental gymnastics necessary to achieve this result are no compliment to the draftsmanship of the Minnesota act.

Another paragraph will be found in sec. 325.04 the necessity for which is certainly hard to explain. Although a very full and inclusive provision, sec. 325.03, had already been devoted to prohibition of locality price discrimination, and though an adequately comprehensive prohibition of sales below cost comprised paragraph one of sec. 325.04, the second paragraph reads:

"Any retailer or wholesaler who sells goods in any part of this state at prices lower than those exacted by *the person elsewhere in the state* for like qualities and grades and where the effect of such lower prices may be substantially to lessen competition or tend to create a monopoly in any line of business, or to injure, destroy, or prevent competition with *the person selling at such lower prices*, shall be guilty of unfair competition and subject to the penalties of section 325.48, subdivision 1; provided, that nothing shall prevent differentials in prices in different localities which make only due allowances for differences in 'cost of doing business' or 'overhead expense' and in costs of delivery for such goods to different localities; nor differences in prices made in good faith to meet legal competition of any other person in such locality."

⁷²1 Minn. Stat. 1941, sec. 325.52: "Any sale made by the retail vendor at less than eight per cent above the manufacturer's published list price, less his published discounts, where the manufacturer publishes a list price; or, in the absence of such a list price, at less than eight per cent above the actual current delivered invoice or replacement cost, *for the purpose or with the effect of injuring competitors or destroying competition*, shall be *prima facie evidence* of the violation of sections 325.02 to 325.07." (Italics supplied)

The reference intended by the words first italicized is doubtful: do they indicate the retail or wholesale vendor himself (thus prohibiting sales below cost) or do they indicate the person referred to in the second group of italicized words, a competitor (thus prohibiting locality discrimination)? It will be noted also that the intent requirement is still different than the two kinds of provisions just observed in sec. 325.03 and sec. 325.04, par. 1. This reads: "where the effect . . . may be substantially to lessen competition," etc., and, unless aided by sec. 325.48, subdiv. 2 (1), would undoubtedly fall under the theory of *State ex rel., English v. Ruback*.⁷³ The third paragraph of sec. 325.04 tends to support the conclusion that the second paragraph (probably unnecessary in view of its duplication of the last sentence in sec. 325.03) was intended to deal with locality discrimination, but even this is dubious. This paragraph can be said generally to add little to the definiteness of the act.

Oregon

The Oregon sales below cost prohibition, sec. 43-104, O. C. L. A. 1940, is clearer in its intent requirement than the Minnesota act but probably less supportable. The section prohibits below cost sales: "where the effect of such sale below cost . . . may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors of such person *engaged in business within this state*." The penalty provision, sec. 43-111, O. C. L. A. 1940, rather stringent in that it decrees punishment for each single violation by fine of "not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500)" or imprisonment not exceeding six months, or both, contains no qualifying words comparable to these of Minnesota's sec. 325.48, subdiv. 2 (1).

Under sec. 43-104 a merchant might be held to a fairly substantial fine if he sold goods below cost, although he had no guilty intent and even no knowledge that his sales would have an adverse effect upon a competitor. The presence of the word "may" according to the *Ruback Case* broadens the prohibition to include not only all reasonably probable consequences but also all conceivable results. The long series of similar but not identical verbs increases the breadth of the prohibitive clause. Further—although the reference of the italicized phrase is not clear—if, as seems likely, it modifies competitor (rather than vendor) the person injured by the merchant's below cost sale could be located anywhere within

⁷³*Supra*, footnote 31.

Oregon. Good faith on the part of the merchant would be no defense to a prosecution if the court should find the sale *might* hinder or injure a distant person not regarded by the merchant himself as a competitor. The *Daniel Loughran Co.* Case held a similar provision to be unreasonable.

Oregon's provision prohibiting locality price discrimination, sec. 43-102 (a), O. C. L. A. 1940, contains a similarly unrestricted intent requirement. Accordingly, the Oregon Anti-price Discrimination Act must be regarded as a member of the group of statutes least likely to be found constitutional because of the absence of a more restricted intent requirement, particularly if any other provisions are found to be indefinite.

B. The Issue of Indefiniteness and Uncertainty

Minnesota

In weighing the definiteness of the definition of "cost of doing business" in sec. 325.01, subdiv. 7, the interpretation of the intent provision above discussed is important. If a construction of sec. 325.04 is adopted which predicates a violation upon an injurious effect on competitors irrespective of the merchant's subjective intent to injure, the absolutism of the cost definition, allowing no room for good faith discrepancies in the merchant's and the courts' computations, probably would render the act invalid.

However, regardless of the nature of intent necessary to constitute a violation, there is a defect in sec. 325.01, subdiv. 7, which is more likely to be serious. In common with every unfair practice act which has been examined, the Minnesota act fails to make any attempt to indicate the method of apportioning overhead expense among the numerous items on sale. Sec. 325.52, quoted above, makes an inept approach toward the setting of a standard by providing that any sale by a retail vendor at less than eight per cent (two per cent for wholesale vendors) of the constituent elements in the term "cost" as defined in sec. 325.01, subdiv. 5, shall be prima facie evidence of violation. In the absence of a recognizable way to rebut this prima facie case by showing the cost of doing business with respect to a single article, the eight per cent would necessarily become the "cost of doing business" within the meaning of the act. Blind adherence to this eight per cent mark-up, in many of the variant types of businesses covered by the act, is cer-

tainly arbitrary and bears no reasonable relation to the ultimate fact of violation of the act.⁷⁴

"Replacement cost," the meaning of which is essential in computation of permissible sales prices, is not defined in the act. Many of the acts do define this term and at least two of these definitions were disapproved because they were uncertain or unreasonable. It may well be doubted whether the words have such a well-defined business significance that definition was unnecessary. Indeed, that those concerned with the act are in doubt over this matter has already been demonstrated.⁷⁵ Sec. 325.05 bears upon replacement cost by indirection where it forbids a merchant to use the invoice cost of merchandise purchased at a "sale outside of the ordinary channels of trade" to justify a price lower than one "based upon the replacement cost as of the date of the sale of the . . . merchandise replaced through the ordinary channels of trade," unless certain precautions are taken to advise the public. If the good faith of a merchant is immaterial, determination of what constitutes a sale outside of "the ordinary channels of trade" may place on him a considerable burden. It will be observed that the provisions of the section are absolute in their mandate and the rule of the *Daniel Loughran Co. Case* will apply unless sec. 325.48, subdiv. 2 (1) alleviates the harshness of sec. 325.05.

The last phrase in the Minnesota act which will be noticed is sec. 325.06 (4), exempting from the act sales below cost made: "In an endeavor made in good faith to meet the legal prices of a competitor selling the same commodity . . . in the same locality or trade area." The indefiniteness of this provision has been discussed above. A similar phrase included in the locality discrimination provision, sec. 325.03, which substitutes the words "local competition" for "legal prices of a competitor," probably achieves no greater certainty.

Oregon

Sec. 43-104 (b), O. C. L. A. 1940 defining "cost of doing busi-

⁷⁴Cf. *State v. Northwest Poultry & Egg Co.*, (1938) 203 Minn. 438, 443, 281 N. W. 753, 755. Here the lack of a standard of apportionment of the items comprising the "actual cost of transportation" was one of the reasons for declaring unconstitutional a 1937 statute disapproving locality price discrimination by buyers of farm products for manufacture or sale.

⁷⁵Attorney-General Burnquist, called upon in July 1941 by the Duluth city attorney, gave his opinion that "replacement cost must necessarily be the present existing price, which may be the price from day to day." Reports of Minnesota Attorney-General, 1941-42, Opinion 349, pp. 501-502

ness" is quoted in the margin.⁷⁶ It will be observed that whatever definiteness is imparted by an enumeration of certain mandatory items of expense is confined to the case of a person engaged in business within the state for a period of time shorter than 12 months. Turning then to the italicized phrase, which alone must control in all other cases, it is apparent that the phrase closely approximates the language of the Minnesota statute held invalid in *Great Atlantic & Pacific Tea Co. v. Ervin*.⁷⁷ Accordingly, since the merchant is precluded from showing his actual current cost of doing business, where it varies from the yearly average, the provision is unreasonable under the theory of the *Ervin Case*.

In case he is a "retailer in food commerce" the merchant in computing his overhead expense may, under sec. 43-104 (c), choose the lower of (1) 6% of replacement cost, or (2) the average monthly cost of doing business during the 12 months preceding an alleged violation of the act. This provision is supplemented by sec. 43-101 (4) defining replacement cost, quoted in the margin.⁷⁸ The latter definition is superior to the definitions invalidated in the *Zasloff* and *Packard-Bamberger Cases* in that the merchant is not required to investigate the entire market to determine the most favorable market price, but need only find a single outlet at which he could have bought the merchandise in question. The period of time involved in his investigation is only a third as long as that in the Pennsylvania and New Jersey cases, thus that portion of his burden is also less. These considerations may well be sufficient to distinguish those cases. The Oregon Attorney-General, consider-

⁷⁶Sec. 43-104 (b), O. C. L. A. 1940: "For the purpose of this section, the phrase 'cost of doing business' or 'overhead expense' is defined as *the average of all costs of doing business incurred in the conduct of such business during the 12 months immediately preceding any alleged violation of this act* or in the event any person shall be engaged in business within the state for a shorter period of time, in that event the average cost for such period immediately preceding any alleged violation of this act must include without limitation the following items of expense: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, buildings and fixtures, transportation and delivery costs, as fixed under tariffs approved by the public utilities commissioner of the state of Oregon, light, heat, power and water, credit losses, all types of licenses, taxes, insurance and advertising." (Italics supplied)

⁷⁷*Supra*, footnote 31.

⁷⁸Sec. 43-101 (e), O. C. L. A. 1940: "The term 'replacement cost' shall mean the cost per unit at the retail outlet at which the merchandise sold or offered for sale could have been bought by the seller at any time within ten (10) days prior to the date of sale or the date upon which it is offered for sale by the seller, if bought in the same quantities as the seller's usual or customary purchase of the said merchandise, after deducting all discounts, rebates, or other price concessions."

ing this provision in the bill before its enactment into law, gave his opinion that the 6% figure was not arbitrary but was reasonable, if the merchant desired to use it instead of the figure reflected by his books. But linked as it is with what is probably an invalid clause, the average cost provision, it is doubtful whether the section could be saved even if the attorney-general's position be accepted.

The difficulty of apportionment of overhead expense among salable items, referred to above in discussion of indefiniteness of the Minnesota act, is not met by the Oregon statute. Another uncertainty problem common to both the Minnesota and Oregon statutes arises from the exclusion from the cost computation of sales "outside of the ordinary channels of trade," Oregon's provision appearing in sec. 43-105, O. C. L. A. 1940.

V.

CONCLUSION

When the issue of constitutionality of the Oregon Anti-price Discrimination Act and of the Minnesota Unfair Trade Practices Act is squarely presented to a court having jurisdiction thereof, it is difficult to see how any conclusion can be reached except the unconstitutionality of both. Without exception, every case which has sustained the sales below cost provisions of an unfair practices act has been based upon a record factually incomplete, the issue having arisen upon demurrer, motion, or certified question. Under those circumstances the courts' reluctance to pronounce a violation of the principles of due process is understandable, and in some instances may have been justifiable. Other courts, in contrast, have not needed the elucidation of a factual record of the nearly insuperable obstacles confronting a merchant who attempts to comply with these statutes.

It appears that the view taken by part of the Wyoming court is unsound, in that it is premised upon the supposition that "simple" accounting methods provide a uniform and acceptable standard *dehors* the statute for governing mercantile cost practices.⁷⁹ That supposition seems ill-founded in view of the prevalent doubt over

⁷⁹Cf. *State v. Langley*, (1938) 53 Wyo. 332, 363-364: "The legislature, doubtless, had such general business methods—reasonable standards of cost accounting for the various classes of business—in mind and believed them to exist. If they do not exist—if cost cannot be ascertained—then the act in question should be held to be unconstitutional. If, on the other hand, the cost is ascertainable, under reasonable methods, then such cost is purely a question of fact, definite and certain, and the standard of conduct set by the legislature, too, is definite and certain."

proper methods of apportionment of overhead costs. The deficiency, common to the unfair practice acts, is one not readily overcome by statutory amendment. It may be that it will be necessary to eliminate the concept of "cost of doing business" to avoid the detailed investigations and computations which make cumbersome both obedience to and enforcement of the sales below cost provisions. Yet, theoretically, it is more fair to consider overhead. It is probably unreasonable to establish an arbitrary mark-up figure by which to increase the actual cost traceable directly to the goods themselves.

Presumably there will be a resumption of the activity of the forces which brought this legislation into being with the termination of the war-frozen price economy. It will be interesting to observe how legislative and judicial ingenuity will balance the demand with constitutional necessities.